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# In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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LUIS M. ORTIZ ET AL. }
*v.* } No. 20. Sierra Mosca Grant.
UNITED STATES. }

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*APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.*

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**REPLY BRIEF FOR UNITED STATES.**

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## REPLY BRIEF FOR UNITED STATES.

It seems proper to add a few considerations in reply the brief of counsel for appellees, although most of the ositions there assumed have been anticipated in the ief already filed by the United States.

1. Counsel for claimants alleges in his brief (pp. 25 d 44) that the governor of New Mexico was rendered dependent of the departmental junta or legislature by e law of March 20, 1837, New Mexico being a fron- r territory, and he apparently argues from this that ere was no necessity of an approval by the assembly

of grants made by the governor. To sustain this proposition he cites section 2 of the law of March 20, 1837, as follows:

> In each department there shall be a governor, appointed by the President of the Republic upon the nomination of three persons by the respective departmental council (junta) without the obligation of being governed thereby in the frontier departments, etc.

Counsel's error lies in the assumption that "thereby" refers to the departmental council, whereas it refers to the nomination of the governor by the council, the obligation of being governed by which did not rest upon the President as to the frontier departments. This is shown by the remainder of the sentence which counsel passes over as "unintelligible but not important for this discussion." The section referred to, when properly translated, is as follows (Reynolds, p. 211):

> In each department there shall be a governor appointed by the President of the Republic upon the nomination of three persons by the respective departmental council (junta), without the obligation of being governed thereby in the frontier departments, *and with the right to return it once in the others.*

This is a law carrying into effect the provisions of the constitution of 1836 (Reynolds, p. 204), section 5 of which has practically the same wording as this law, but is a little clearer:

> The governors shall be appointed by the latter from three persons nominated by the departmental board, without obligation to *consider said nomination in the case of the frontier departments* and with power to return the same once in the others.

2. Counsel dwells at great length upon the question of what is property, and on page 31 of his brief cites a number of authorities to show that the term "comprehends every species of title, inchoate and complete." The Government does not dispute the existence of these authorities, but does deny their applicability to the present case. The question is not what constitutes "property;" it may be, and is, admitted that the title here presented conveys a species of property. It is denied, however, that it is the character of property right of which the Court of Private Land Claims can take cognizance under the act of 1891.

Congress must provide for the protection of property, as the United States has stipulated to do under the treaty of 1848. This it may do either by confirming titles itself or by conferring that power on the courts. These latter may act only so far as such power is delegated to them, and the act of 1891 does not delegate the power to confirm a title whose completion, whose "definitive validity," depended on the grace of the departmental assembly.

3. The case of *Horsby* v. *United States* (10 Wall., 224) is cited against the position taken in Point II of the brief for the Government. That decision, it will be noted, is dissented from by three of the justices, but considering it to be the mature and deliberate judgment of this court, it still does not militate against the views here urged. That was a case arising under the California act, and all that was necessary to a decision in that case was the ascertainment of whether a grant made by the governor and unapproved by the assembly was "a right or

title" emanating from the Spanish or Mexican Govern ment, as provided by the act of 1851. The court ther held that it was such "a right or title" as was entitled t confirmation, but it goes further and says that upon th making of the grant by the governor a title rested sub ject to defeasance by act of the assembly. This, unde the decisions cited on page 50 of the original brief for th Government, was an imperfect title, and Mr. Justic Field, speaking for this court, so holds on page 241 o Hornsby's Case, where he says:

> The interest which passed by the grant, whethe it be regarded as a legal title, *imperfect in its charac ter* and to be perfected by a subsequent official sur vey and segregation of the quantity designated, o as a *mere equitable* or *inchoate title*, constituted prop erty which the United States were bound to protec by the stipulations of the treaty of cession.

Under this decision, as well as under the numerou others cited to the same effect in the original brief fo the Government, this title was imperfect and inchoate a the date of the treaty. Had claimants a lawful right t make it perfect under the former Government? Coul they demand from the assembly a decree of approval a a matter of right? If not, the claim is not within th terms of the act of 1891; and that it is not it is believe the authorities heretofore presented abundantly establish

4. The construction of the act of 1891 here sough will not render nugatory the provisions of that act for th protection of imperfect titles. There have been a num ber of claims pending in the land court under this depart ment of the court's jurisdiction and a number confirmed

Among these have been Spanish grants where, by reason of possession under the grant for the term of years provided by law, parties were adjudged entitled to demand a final consummation of their title. There are likewise a number of grants made under the Mexican system in which purchase money was paid to and accepted by the former Government, but in which the orders necessary to vest perfect title had not been entered. In these cases the holding has been that this Government was bound to perfect the imperfect title presented. These are instances where this section of the act has been effectual to secure confirmations and thus justify the wisdom of Congress in conferring that jurisdiction upon the court.

The present case, however, stands upon an entirely different footing. There are pending only four or five claims involving this question, and these are the only cases that will be affected by the decision herein rendered. To refer these claimants to Congress for the relief sought will work no particular hardship upon them, but even if it should, that is a matter with which this court has no concern. Congress has reserved to itself to act upon the equitable rights involved.

5. Claimants complain that the Government of the United States delayed until 1891 the establishment of a tribunal before whom they could present their testimony, and that meanwhile many of their witnesses have died. They overlook the fact that as early as 1854, six years after the treaty, Congress provided such a tribunal, and that in the act of 1891 it has provided that testimony, when "lawfully and regularly received" by that tribunal,

shall be admissible as evidence upon proof of the death of the witnesses. If claimants saw fit to delay the taking of their testimony before the surveyor-general until such witnesses were all dead they have no one to blame but themselves.

6. Counsel pretends (brief, p. 14) that the title papers presented in this case came from the archives. No one knows better than the learned counsel, who also represented the claimants before the surveyor-general, that there is not a particle of basis of fact for this suggestion. It was never pretended on the hearing of the case below that this paper was an archive, and there is not a particle of evidence in the record to sustain it. On the contrary, the testimony of Mr. Sidebottom (R., 7), the custodian of documents in the surveyor-general's office, is as follows:

> Q. What papers does it [the docket] show that have *been filed by the claimants?*
>
> A. *It shows the filing in 1872 of a Spanish document*, etc.

Mr. Sidebottom thereupon (R., 7) identifies the grant paper here presented as the Spanish document just referred to. It is hardly the part of candor for counsel to contend in his brief that this is an archive. It is not one, and counsel knows it is not one.

7. Counsel stated to this court on the argument that the proof shows continuous possession of this tract from 1846 to "the present time." This is manifestly erroneous. As pointed out in the brief heretofore filed, not a single witness as to possession was produced on the hearing of this cause before the court below. The only

witnesses on this point were those examined before the surveyor-general in 1873. It is left to the ingenuity of counsel to show how witnesses examined in 1873 could prove continuous possession up to "the present time." Even as to this possession up to 1873, the proof is of the most general character, and is set forth in the original brief filed for the United States (p. 14), and is discussed in that brief (p. 147 et seq.).

8. Counsel complains that the reference in the brief of the Government to the Gaspar Ortiz y Pais grant does not set forth that that grant is a forgery. It does not do so for the very satisfactory reason that the representatives of the Government have no knowledge, official or personal, that it is a forgery, or that it is admitted by the claimants thereof to be forged. That claim was presented under the act of 1854 to the surveyor-general just as this claim was presented. (R., 79.) A survey of that grant was made by the surveyor-general just as of this. (R., opp. p. 79). Testimony was taken therein (R., 118, 119) establishing possession of the grant held from an early date, and on the trial below Julian Ortiz (R., 22) testified as to claiming an interest therein. Despite counsel's claim to the contrary (R., 58), a claim for this grant was never presented to the Court of Private Land Claims. It was never abandoned before that court, and there has never been a judicial determination of its invalidity. Nothing is said in the brief of the United States as to that grant being forged for the further reason that there is nothing in the record whatever upon which to predicate such a statement and the case is being

discussed on the record. The record does show, however, that such a grant, covering a portion of these premises and alleged to have been made in 1805, is still claimed; and probably the only reason why the parties claiming under that grant, Julian Ortiz and others, did not come into court and present this grant of 1805 is because claimants in this case failed to comply with section 6 of the act of 1891, requiring them to serve "a copy of their petition, with a citation," upon any adverse possessor or claimant. The fact that they did not do so, although it appears that a claim is still being made under that grant of 1805, would justify this court in remanding this case to the court below, as was done in the case of the city of Albuquerque at the last term, in order that such adverse possessors or claimants may be cited to appear, may produce their alleged grant of 1805, and the rights of all parties claiming an interest in such land may be adjudicated as against the United States in one proceeding.

9. It is urged by the United States in the brief heretofore filed that the recital in the negotiations prior to the treaty of 1846, and in the protocol subsequently adopted, that no grant issued in the territories of California or New Mexico subsequent to May 13, 1846, is legitimate, is of weight, as bearing on the improbability that this grant was made on June 4, 1846. Counsel for claimants says that Mexico objected to the clause in the protocol and the proposed treaty, and the Senate amended the treaty by acceding to the objections of Mexico. This is as erroneous, as a matter of fact, as are counsel's statements that the title paper here tendered is

an archive, and that the Gaspar Ortiz y Pais grant of 1805 was presented to the Court of Private Land Claims and subsequently abandoned. These assertions, without a shadow of fact to sustain them, savor of recklessness. As a matter of fact, the treaty of 1846 was not rejected by the United States Senate because of this provision as to May 13, 1846, or for any other reason suggested by Mexico, but because it contained a provision permitting conditions in grants unfulfilled at the date of the treaty to be performed thereafter. A full reference to this diplomatic incident is found in *Interstate Land Company* v. *Maxwell Land Company* (139 U. S., 588).

10. Counsel's reckless manner of dealing with the record is further illustrated on page 81 of his brief, where he says that the testimony of Mr. Tipton "does not give even the opinion of Tipton as to whether either of said documents produced by him for comparison with either of the two signatures of Armijo and of Vigil y Alarid are, in his opinion, genuine signatures of Armijo and of Vigil y Alarid." This statement is completely answered by the record where Mr. Tipton (R., 46), in reponse to a question calling for his opinion as to the genuineness of the fourteen or more standards of comparison, says:

> My opinion is that all the signatures referred to in the question are genuine signatures of Governor Armijo.

As to the genuineness of the standards of comparison of the signatures of Vigil y Alarid, he says:

> My opinion is that they are all genuine signatures of Juan Bautista Vigil y Alarid.

This testimony of Mr. Tipton and the archive standards of comparison accompanying it and explanatory of it are admissible under the rule laid down in *Rogers* v. *Ritter* (12 Wall., 317), and *Sill* v. *Reese* (47 Cal., 294), cited in the brief heretofore filed.

11. Counsel for claimants contends, on page 83 of his brief, that the peculiarity in Armijo's signature to which Mr. Tipton refers, that of sloping upward from left to right, is shown not to have been always present by plaintiffs' Exhibits C–2, H–2, and I–2. While it is to be admitted that this peculiarity is more marked in some of Armijo's signatures than in others, even in these three signatures to which counsel refers the characteristic is present. The application of a straight edge and triangle will show that these signatures are not parallel to the top and bottom of the page, or perpendicular to the side. Counsel also refers to his Exhibit E–2 as establishing a very great difference in the method of forming the letters by Armijo. This standard, dated in December, 1828, nearly twenty years prior in date to the signatures presented by the Government as standards, is too remote to form a proper basis of comparison; but were it otherwise, it contains nothing to dispute the testimony of the Government. The signature on this standard dated December 6, 1828, has an erratically formed "A" which was the result of some unusual circumstance attending its production, such as the writer's arm coming in contact with some object on the table which diverted the pen from its customary course; but there is in the signature no evidence of the presence of any habit of writing other than Armijo's. This is equally true of the other two signatures, also dated in

1828, on that document; and they were readily identified by Mr. Tipton as in his opinion the genuine signatures of Governor Armijo (R. 58, 59), based upon his acquaintance with the signature of that official.

12. The steel-pen theory upon which counsel insist will not do. It is not shown that Armijo ever used a steel pen, and it is highly improbable that in signing his name to a document of this importance he would have used an instrument with which he was so lacking in acquaintance as to cut through the paper by repeated strokes in the formation of several letters. On the other hand, it is precisely what would have been done by a party attempting to imitate a signature, and who, failing at the first attempt to make a successful imitation, traces and retraces in the hope of securing a better result. Further, Mr. Tipton testified on the trial that years of experiment had not enabled him to discover any appreciable difference in the characteristics of handwriting in quill and steel pens. The habits which unconsciously enter into handwriting and which stamp the signature of a writer as his very own are always present, no matter what may be the instrument with which he writes. While the instruments used may affect the physical appearance of the writing, they do not at all affect the manner and methods of forming letters and writing words as these are revealed under the microscope and to the experienced eye of the student of penmanship. The same observations are applicable to the suggestion that the difference in the signatures can be attributed to a varying state of health, nervousness, etc. Such conditions may make the signature *look* different, but

they do not and can not uproot and overturn the habits which control the formation of letters. Such habits are absolutely reliable as tests because unknown to the writer, and hence not subject to his will. They are the results of years of use of the muscles of the hand for a given purpose, and the character of the pen or the health of the writer can no more alter the *true characteristics* of the writing than they can alter the organism of the muscles which reproduce those characteristics. But concede that steel pens or nervousness made Armijo completely revolutionize in a day his method of writing, is any similar explanation available as to the signature of Juan B. Vigil y Alarid? And yet Mr. Tipton testifies that the latter's signature is fictitious. Does it explain how the granting decree (according to plaintiff's witness) could have been written by Armijo's clerk, and yet, according to Mr. Tipton's testimony, written by the same hand that signed Armijo's name? Does it explain how a party *who never was alcalde* could deliver juridical possession as alcalde? The document in question is vulnerable on too many points to leave a reasonable doubt as to its fictitious and fraudulent character.

Respectfully submitted.

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